ORIGINAL

No. 95-5996

(3)

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DAVID J. CARPENTER,

Petitioner,

v.

JAMES H. GOMEZ, Director, California Department of Corrections, and ARTHUR CALDERON, Warden, California State Prison at San Quentin,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTION PRESENTED

Depending on the circumstances, may juror misconduct be subject to a harmless error analysis?

TABLE OF AUTHORITIES, CONT'D

Statutes

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OPINION OR JUDGMENT BELOW

Petitioner seeks review of *In re David Joseph Carpenter on Habeas Corpus*, 9 Cal. 4th 634, 889 P. 2d 985, 38 Cal. Rptr. 2d 665 (1995), in which the Supreme Court of California reversed a trial court's order granting a Writ of Habeas Corpus. The opinion is set forth in Petitioner's Appendix A. The California Supreme Court's order modifying its opinion is reported at 10 Cal. 4th 256a, 95 L.A. Daily Journal D.A.R. 6368 (1995). The order is set forth in Petitioner's Appendix B.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court to review a final decision of the highest court of the State of California for error under the Constitution of the United States pursuant to Title 28, United States Code, section

1257(a). The Supreme Court of the State of California filed its opinion on March 6, 1995. Carpenter's petition for a rehearing was denied and modifications to the opinion were filed on May 17, 1995. Petitioner's request for extension of time in which to file a Petition for Writ of Certiorari was granted by Justice O'Connor on August 7, 1995, and time in which to file a Petition for Writ of Certiorari was extended to September 14, 1995. A Petition for Writ of Certiorari was filed on September 14, 1995.

CONSTITUTIONS, STATUTES OR REGULATIONS

Petitioner relies upon the Fifth, Sixth, Eighth and Fourteenth amendments to the Constitution of the United States. These provisions are set forth in the Petition for Writ of Certiorari at page two.

STATEMENT OF THE CASE

Petitioner, David Joseph Carpenter, was convicted of capital murder and sentenced to the death penalty.

In 1985-1988, following a change of venue because of pretrial publicity, Carpenter was tried in the County of San Diego for five capital murders, two rapes, and one attempted rape, which had occurred in the County of Marin.[1] Following

1. Previously, in 1983-1984, following a change of venue because of pretrial publicity, Carpenter was tried in the County of Los Angeles for two capital murders, an attempted murder, one rape and an attempted rape, which had occurred in the County of Santa Cruz. Following his conviction of these crimes, he was sentenced to the death penalty for each of the capital murders. The Los Angeles judgment is pending review in the Supreme Court of the State of California.

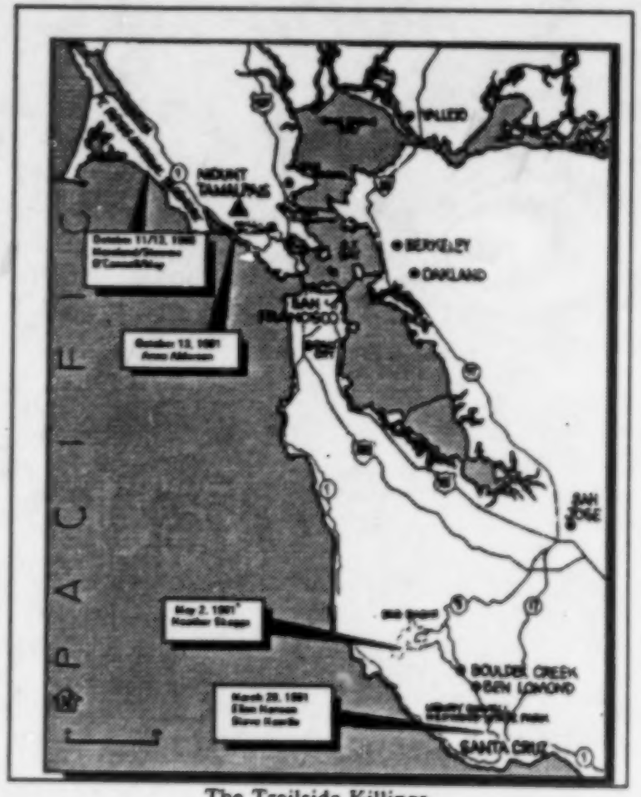
his conviction of these crimes, he was sentenced to the death penalty for each of the capital murders.

While the San Diego judgment of death was pending review in Supreme Court of the State of California, Carpenter sought a Writ of Habeas Corpus from the trial court due to juror misconduct. On June 15, 1989, the Superior Court of the State of California in and for the County of San Diego granted the Petition for Writ of Habeas Corpus and vacated the judgment of conviction and death penalty.

On March 6, 1995, the Supreme Court of the State of California reversed the judgment granting the Writ of Habeas Corpus and denied the petition without prejudice to Petitioner to file a new petition in the California Supreme Court. Although the San Diego death penalty judgment is pending review in the California Supreme Court, Petitioner nevertheless seeks review of the California Supreme Court's decision reversing the judgment granting a Writ of Habeas Corpus.

STATEMENT OF THE FACTS

During a period which began during the Columbus Day holiday weekend of 1980 and ended in early May 1981, Carpenter prowled the trails at Mount Tamalpais and the Point Reyes National Seashore in Marin County and Henry Cowell State Park and Big Basin State Park in Santa Cruz County, where he attacked, sexually assaulted and brutally murdered Cynthia Moreland, Richard Stowers, Anne Alderson, Diane O'Connell, Shauna May, Ellen Hansen and Heather Skaggs, and where he seriously wounded Steve Haertle.



The Trailside Killings

On October 11, 1980, Cynthia Moreland and Richard Stowers were shot and killed while hiking the trials at Point Reyes National Seashore in Marin County. A .38 caliber

projectile, or projectile fragment, was recovered from each of the victims.

On October 13, 1980, Anne Alderson was raped, shot and killed while she was hiking the trials at Mount Tamalpais in Marin County. A .38 caliber projectile fragment was found about twelve inches from the victim's head.

On November 28, 1980, Diane O'Connell and Shauna May were shot and killed while hiking the trails at Point Reyes National Seashore in Marin County.[2] A .38 caliber projectile, or projectile fragment, was recovered from each of the victims.

On March 28, 1981, Ellen Hansen was shot and killed and her boyfriend, Steve Haertle was shot and wounded while hiking the trails at Henry Cowell State Park in Santa Cruz County.[3] A .38 caliber projectile was recovered from Hansen's body.

On May 2, 1981, Heather Skaggs was raped, shot and killed at Big Basin State Park in Santa Cruz County. A .38 caliber projectile was recovered from the victim.

Ballistics tests revealed that the projectiles recovered from each of the victims were fired from the same firearm, a .38 caliber Rossi revolver, serial number D484341, traced to Carpenter. Steve Haertle and another eyewitness positively identified Carpenter as the person who shot him and

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2. Prior to killing O'Connell and May, Carpenter attempted to rape O'Connell and did rape May.

3. Prior to killing her, Carpenter also attempted to rape Hansen.

Ellen Hansen. Each of the crime scenes was remarkably similar in its seclusion from nearby hiking trails.

Carpenter claimed someone else shot and killed the victims and that he was elsewhere when the killings occurred.

ARGUMENT

THE PETITION SHOULD BE DENIED INASMUCH AS THE SAN DIEGO JUDGMENT AND DEATH PENALTY REMAIN SUBJECT TO REVIEW IN THE CALIFORNIA SUPREME COURT. ALTERNATIVELY, THE PETITION SHOULD BE DENIED INASMUCH AS THE CALIFORNIA SUPREME COURT CORRECTLY DETERMINED JUROR MISCONDUCT INVOLVING EXPOSURE TO EXTRANEOUS INFORMATION IS SUBJECT TO AN HARMLESS ERROR ANALYSIS.

Petitioner seeks review of whether juror misconduct may ever be deemed to be harmless error. Respondent maintains the California Supreme Court correctly determined that certain juror misconduct is subject to an harmless error analysis and that further review of this question in this case, at this time, is not necessary.

Carpenter was tried first in Los Angeles for capital murders committed in Santa Cruz County and then in San Diego for capital murders committed in Marin County. For the guilt phase of the San Diego trial, the trial court permitted evidence of the facts underlying all of the crimes committed in both Santa Cruz County and Marin County, except those against Heather Skaggs, which were excluded as substantially more prejudicial than probative under California Evidence Code section 352. For the penalty phase, it permitted evidence of the facts underlying all the crimes. For both phases, it barred evidence of Carpenter's Santa Cruz/Los Angeles convictions and death sentence as substantially more prejudicial than probative.

Throughout jury selection and the trial, the trial court repeatedly admonished the prospective jurors, and then the jury, that it was their duty not to discuss the case among themselves or with others and to avoid publicity related to the case. Barbara Durham was selected as one of twelve jurors and became the jury foreman.

Following the San Diego trial and verdicts, which found him guilty of five counts of murder including special circumstances, as well as several other crimes, i.e., rape and attempted rape, and which determined that the penalty to be imposed was death, Carpenter was sentenced to the death penalty.

Two months after being sentenced, in the Superior Court of the State of California in and for the County of San Diego Carpenter filed a Petition for Writ of Habeas Corpus which essentially claimed he was denied a fair trial due to juror misconduct. In particular, Carpenter contended that, sometime during the trial proceedings, Juror Barbara Durham, the jury foreman, learned that Carpenter previously had been convicted of murder and had been sentenced to death and that she failed to disclose this knowledge to the trial judge. The matter was assigned to the trial judge who issued an order to show cause.

Following the filing of a return and traverse, an evidentiary hearing was held. At the evidentiary hearing, the testimony of several witnesses was taken. According to Michael Lustig and Donna Duran, during the evening of March 26, 1988, while at the Lakeside Resort, a Cuyamaca night club, they met

Barbara Durham and her husband with whom they were acquainted.[4] According to Lustig and Duran, Barbara mentioned she was then serving as a juror on the trailside murder case. Barbara further stated that, although she was not suppose to know about it, she was aware that the defendant previously was convicted of similar crimes in another county. According to Lustig and Duran, Barbara stated she either read about the prior case in the newspaper, or her husband told her about it. According to Lustig, Barbara also stated she was aware the defendant previously had been sentenced to suffer the death penalty and that Carpenter had been abused quite severely while growing up.

According to Barbara Durham, although she recalled talking to Lustig and Duran at the Lakeside Resort, the conversation involved only a passing reference to her jury. According to Barbara, when asked what she had been doing lately, she stated she was on jury duty. When asked if she was involved with the Peyer case,[5] she said she was not involved in that case. When asked which case she was involved with, she said it was the Trailside Killer case. She mentioned she had been involved in the case for several months

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4. Also present were Maria Contreras-Diego, Lustig's housekeeper, and Contreras-Diego's son, Lewis. According to Contreras-Diego, after dinner the Durhams were invited to join them at the Lustig table. Although Contreras-Diego heard Barbara Durham speak about a trial, she paid no attention to the conversation.

5. The Peyer case involved the murder of a young woman by a California Highway Patrol officer, Craig Peyer, which received extensive media attention.

and it was expected to continue on into the summer months. Other discussion, mostly between her and Duran, dealt with the problems involved in lengthy jury service and its impact on her job. At no time did she say she was not suppose to know it but had learned that defendant had been convicted of similar crimes in another county and had been given the death sentence. She never said she learned such information from her husband, nor did she describe the defendant as an average guy, or speculate why he would have committed the crimes charged, or describe the defendant's conduct during the trial. She did recall that she and Duran spoke about the Peyer case, that she said she often drove the same route involved in that case and that she had seen Peyer in the courthouse hallways on several occasions. Barbara unequivocally denied ever knowing that Carpenter previously had been convicted of murders in Santa Cruz County, or that he had received a death sentence until after the jury on which she served had been discharged.

According to Ron Durham, Barbara's husband, although prior to the Lakeside Resort event he was aware that Carpenter previously had been convicted of murder elsewhere and had been given a death sentence, he never revealed such knowledge to his wife while she was serving as a juror. However, he did discuss these facts with Tom Boulding and several other co-workers. They would ask him about the trial and whether Barbara was still involved with it. He responded that it was difficult to deal with because he knew about the case, but that they could not discuss it. He felt the San Diego trial

was a waste of taxpayers' money. He first discussed what he knew about Carpenter's prior history with his wife after the trial was completed. Barbara came home after it was over and said she had found out after the sentencing that Carpenter may be tried again for some other crimes. He then told her what he previously had learned, that Carpenter previously had been convicted of several murders elsewhere and given the death sentence. The evening they met Lustig at the Lakeside Resort there was a conversation about his wife's jury service, but it was limited to the length of time involved. The subject arose when Barbara was asked what she was doing. So far as he could recall, the conversation did not involve what he knew about the Carpenter case, or about what was occurring during the trial.

According to Thomas Boulding, a business acquaintance of Lustig, he considered Lustig untrustworthy. According to Boulding, he also knew Barbara Durham and frequently socialized with the Durham family. When he learned that Barbara was serving as a juror, he asked her how the case was going. Barbara responded that she could not talk about the case.

Following the evidentiary hearing, the superior court stated its findings of fact and conclusions of law and determined the alleged juror misconduct did occur. From all the evidence, the superior court determined that Juror Durham had committed misconduct by receiving information outside of court relating to the convictions and death sentence for the

Santa Cruz County crimes. By March 26, 1988, during the guilt phase, she had received the forbidden information from newspaper accounts, either directly, or indirectly through her husband. The superior court also found that Juror Durham had committed misconduct by discussing the case pending before her, and Carpenter's Santa Cruz convictions and death sentence, with nonjurors on March 26, 1988, while dining together at a San Diego resort.

Having found misconduct, the superior court ordered a separate hearing on prejudice. At the hearing, the parties presented extensive argument, but did not introduce additional evidence. Thereafter, the superior court further concluded the presumption of prejudice was not rebutted and that Carpenter was entitled to a new trial as to both guilt and penalty determinations. However, following its determination of prejudice, the superior court further commented, as follows:

> . . . I would find that, despite the information that Mrs. Durham knew . . . that any jury would have sentenced the defendant to the death penalty based upon the evidence presented and [I] would also find that the evidence was so overwhelming with respect to the defendant's guilt that, if the harmless error standard applied in this case, that Mrs. Durham's misconduct . . . would be harmless beyond a reasonable doubt.[6]

Thereafter, a superior court judgment and order was filed granting a Writ of Habeas Corpus and vacating the judgment of conviction and death sentence previously entered.

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6. A copy of the transcript setting forth the superior's court's findings is attached as an appendix.

The question of whether juror misconduct is subject to an harmless error analysis depends on whether the juror misconduct is a structural defect or a mere trial error. *Cf. Arizona v. Fulminate*, 499 U.S. 279, 307-310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). In *Fulminate*, this Court held that only a structural defect type error was not subject to an harmless error analysis. *Id.* at 309.

A careful examination of federal constitutional law suggests that juror misconduct, in its many forms, is not always a type of deficiency which undermines the integrity of the trial and thus must be treated as reversible error per se. Critical to a proper understanding of juror misconduct is recognition of whether the surrounding facts or circumstances reveals actual bias or imputed bias. *See Smith v. Phillips*, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982).

In *Phillips*, during the state court trial one of the jurors applied for employment as an investigator in the district attorney's office. *Id.* at 212. When the defendant learned of this fact after trial, he unsuccessfully moved to set aside the verdict. The state trial court found that the employment application was an indiscretion but concluded it did not indicate prejudice against the defendant or an inability to decide guilt or innocence solely on the evidence. *Id.* at 213-214.

This Court found no constitutional infirmity in the verdict despite the obvious inherent motivation the job applicant may have had to reach a verdict favorable to the

prospective employer. *Smith v. Phillips*, 455 U.S. at 215. It rejected that "the law must impute bias to jurors," stating that the Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove *actual* bias." *Id.* at 215, italics added. This Court reviewed prior decisions and concluded that they

> . . . demonstrate that due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible; *it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote*. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

Smith v. Phillips, 455 U.S. at 217, italics added.[7]

Several subsequent cases further illustrate the need for actual bias before a harmless error analysis may not be employed. *Compare Rushen v. Spain*, 464 U.S. 114, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983) [finding improper ex parte communications between the trial court and jurors during a lengthy trial was harmless]; *and McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d

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7. Although there is a split of authority among the circuits, it further appears that the rule that juror misconduct is presumptively prejudicial (*Remmer v. United States*, 347 U.S. 227, 229-230, 74 S. Ct. 450, 98 L. Ed. 654 (1954)) was abandoned by *Phillips*. *United States v. Sturman*, 951 F.2d 1466, 1478 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2964 (1992); *United States v. Madrid*, 842 F.2d 1090, 1093 (9th Cir. 1988), *cert. denied*, 488 U.S. 912.

663 (1984) [holding that a new trial was not required due to a juror's failure to disclose certain information during voir dire unless the juror's failure denied Respondents their right to an impartial jury].

Moreover, as several circuit courts have recognized, most errors are subject to harmless error analysis including some types of juror misconduct. *Compare United States v. McDonald*, 933 F.2d 1519, 1525 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 270, 116 L.Ed.2d 222 [ex parte communication between judge and juror harmless in light of overwhelming evidence of defendant's guilt]; *United States v. De La Vega*, 913 F.2d 861, 871 (11th Cir. 1990), *cert. denied sub nom. Carballo v. United States*, 114 L. Ed. 2d 99, 111 S.Ct. 2011 (1991) [jury foreman's actions in reading a book while on jury duty, showing passages to the jury and organizing deliberations based on the book was harmless error]; *United States v. Boylan*, 898 F.2d 230, 262 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 139 (1990) [circulation among jurors of magazine article referring to defendant's counsel was harmless]; *United States v. Chang An-Lo*, 851 F.2d 547, 559 (2d Cir. 1988), *cert. denied*, 488 U.S. 966 [a juror telling other jurors about article he read was harmless]; *United States v. Bolinger*, 837 F.2d 436, 439-440 (11th Cir. 1988), *cert. denied*, 486 U.S. 1009 (1988) [juror's reference to newspaper article in presence of nine other jurors was harmless because seven jurors had not been exposed to substance of article and evidence against defendant was overwhelming]; *and Lacy v.*

Gardino, 791 F.2d 980, 986-987 (1st Cir. 1986), *cert. denied*, 479 U.S. 888 [juror's peeling tape off exhibits revealing information about defendant's criminal record harmless because properly introduced evidence pointed to defendant's guilt and jury would have convicted defendant regardless of exposed information].

Moreover, so far as concerns the nature of the extraneous information, i.e., that Carpenter previously was convicted of capital murder and sentenced to the death penalty, this Court also recently held that evidence of a defendant's previous convictions and death sentence was irrelevant evidence which did not involve constitutional error and the admission of such evidence did not contravene the principle established in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985). *Romano v. Oklahoma*, 512 U.S. ___, 114 S. Ct. 2004, 129 L. Ed. 2d 1, 9-14 (1994).

Following its consideration of these authorities, in this case the California Supreme Court determined that "when misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record and may be found to be nonprejudicial. *In re Carpenter*, 9 Cal. 4th 634, 653, 889 P.2d 985, 38 Cal. Rptr. 2d 665 (1995). To evaluate the impact of such information, the California Supreme Court set forth a two-part test. *Id.* at 653.

According to the California Supreme Court, reversible juror misconduct will be found if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror; or if the nature of the misconduct and surrounding circumstances as revealed in the "entire record" indicate it is substantially likely the juror was actually biased. *In re Carpenter*, 9 Cal. 4th at 653. In an extraneous information case, the "entire record" logically bearing on a circumstantial finding of likely bias includes the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and the issues at trial, and the strength of the evidence against the defendant. *Id.* at 654.

Applying this test, in this case the California Supreme Court concluded (1) the superior court erred when, in the light of *Romano*, it analogized the misconduct and resultant extraneous information to error under *Caldwell*; (2) the superior court erred when it found the extraneous information was inherently prejudicial in and of itself without reference to the rest of the record including particularly its refusal to consider the "overwhelming" evidence of guilt, as well as the evidence supporting the penalty determination; and (3) that the surrounding circumstances do not necessarily reveal a substantial likelihood the juror was impermissibly influenced by the outside information. *In re Carpenter*, 9 Cal.4th at 655.

In this case, the California Supreme Court's determination was well supported by the habeas record before it. The outside information, which Juror Durham learned, was the fact that Carpenter previously had been sentenced to the death penalty. As the California Supreme Court recognized and applied, *Romano* clearly indicates that the extraneous information does not involve *Caldwell* error. Moreover, the extraneous information was not inherently prejudicial particularly in view of the fact that evidence of most of the Santa Cruz County crimes was presented to the jury, as well as the superior court's finding that evidence of guilt, as well as the evidence supporting the penalty determination, was "overwhelming."

Regarding the surrounding circumstances, nothing in this record reveals that the extraneous information actually impermissibly influenced the juror. Like the situation recognized in *Romano*, the effect on Juror Durham is speculative at best. It seems at least equally plausible that the evidence could have made her more inclined to impose a death sentence, or it could have made her less inclined to do so. In fact, the evidence here, which indicated that Juror Durham's husband was critical of the time and money spent on the San Diego/Marin trial because of the earlier death penalty, suggests that, if one inclination appears more likely, it is the inclination not to impose a death sentence.

Although Juror Durham failed to report what she learned, this fact too does not show bias. Many jurors, in

the middle of a long and notorious trial, might, for many reasons unrelated to bias, be reluctant to report what they know they should not have learned. It is not difficult to understand that a juror may fear the wrath of the trial judge, or of her fellow jurors and might prefer -- improperly to be sure -- to remain silent.

Although, Juror Durham also told nonjurors both what she knew and that she knew it was forbidden information and, after the verdict, denied the misconduct, it does not follow that she thereby failed to base her verdict solely on the evidence. Nothing in this habeas record supports a finding that she based her verdict on the extraneous information. Moreover, nothing in this habeas record indicates Juror Durham discussed the defendant's guilt or innocence or said anything suggesting she had prejudged the case. Finally, nothing in this habeas record indicates Juror Durham told any fellow jurors what she had learned.

Thus, the petition should be denied inasmuch as the California Supreme Court correctly determined that juror misconduct involving exposure to extraneous information is subject to an harmless error analysis. Furthermore, this petition should be denied because the San Diego judgment and death penalty remain subject to review in the California Supreme Court. The underlying judgment and death penalty are pending review in the California Supreme Court. In reversing the judgment granting a Writ of Habeas Corpus the California Supreme Court did so without prejudice and expressly invited

Petitioner to file a new petition in the California Supreme Court which would be considered after the appellate record has been certified.

CONCLUSION

For the reasons stated, Respondent respectfully requests the Petition for Writ of Certiorari be denied.

Dated: October 5, 1995.

Respectfully submitted,

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APPENDIX A

a 15-minute break, and then I'll give my decision.

(Recess.)

THE COURT: All right. In this case, on April 12 of this year, the Court found that Barbara Durham, the foreperson of the Carpenter jury, had committed juror misconduct and that she had violated the Court's admonition not to read about or discuss the David Carpenter case. And as a result of her misconduct, the Court finds that she learned that the defendant had been convicted of other similar crimes and that a death penalty sentence had been imposed on the defendant in the other case.

As a result of this misconduct -- a presumption of prejudice arises from any juror misconduct, which may be rebutted by an affirmative evidentiary showing that the prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable possibility of actual harm to the complaining party resulting from the misconduct which the Court finds to mean is that could have this affected any jurors' impartiality, and the Court should review the entire record to make that determination.

And unless the prosecution rebuts this presumption of prejudice by proof that no prejudice resulted, the cases hold that the defendant is entitled to a new trial.

Whether a defendant has been injured by jury misconduct in receiving evidence outside of court as the case of PEOPLE v. MARTINEZ has held is a three-prong test.

82 Cal.App.3d 1, 22

The first part of the test is whether the juror's impartiality has been adversely affected; second, whether the prosecution's burden of proof has been lightened; and third, whether any asserted defense by the defendant has been contradicted by the misconduct.

The MARTINEZ court has held that if the answer to any of these questions is in the affirmative, that the defendant has been prejudiced and the conviction must be reversed. Both the prosecution and the defendant in this case agree that PEOPLE vs. MARTINEZ is the proper test for the Court to determine in evaluating the misconduct of Barbara Durham.

Since jury misconduct is not per se reversible, if the Court's review of the entire record demonstrates that the defendant has suffered no prejudice in any of the three areas described from the misconduct, then a reversal and new trial is not compelled.

In this case, the trial constituted two phases under Penal Code Section 190.1, and it requires that an analysis of the affect of the juror misconduct on each phase must be determined to determine what appropriate remedy, if any, exists for the defendant or the petitioner in the habeas corpus petition. And the Court has decided, first, to analyze the penalty phase of this case first.

The case of CALDWELL vs. MISSISSIPPI, a recent Supreme Court United States case, has held that it's constitutionally impermissible to rest a death sentence on a determination made by a juror who has been led to believe

that the responsibility for the defendant's death rests elsewhere in that juror's determination.

The Supreme Court has repeatedly said in that case and others that under the Eighth Amendment of the United States Constitution the qualitative difference of death from all other punishments requires correspondingly a greater degree of scrutiny of the capital sentencing determination.

In the CALDWELL case, the prosecutor argued that the ultimate responsibility for determining the appropriateness of the death sentence rests not with the jury, but with the appellate court which later reviews the case. The U.S. Supreme Court reversed the jury's death penalty, finding that that case, based upon that argument which impermissibly allowed the jury to believe that the ultimate responsibility for the death sentence was someone else's and not their own.

This has been -- similar reasoning has been used by the California Supreme Court in cases where the Court gives what has been known as the "erroneous BRIGGS instruction" to the jury which tells the jury in the penalty determination that the governor of the State of California has the power to commute any sentence of death that the jury would issue.

And the case of PEOPLE vs. RAMOS and other cases which follow have held that such an instruction to the jury is impermissible and would result in a reversal of any penalty phase case where such instruction was given.

Now, in evaluating in the CALDWELL case, the prejudicial effect of the prosecutor's argument, the Court there said they must recognize that that type of argument offers the jury a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals usually placed in an unfamiliar situation and called upon to make a difficult and uncomfortable choice.

They are confronted with evidence and argument on the issue of whether or not another person should live or die. And if they are asked to decide that issue on behalf of the community, moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them a substantial degree of discretion.

Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Now, in this case the Court found that Mrs. Durham had knowledge from her husband that Mr. Carpenter, because of a conviction in similar crimes, had been given the death sentence by another jury. In this Court's judgment, without any question, this information would serve to minimize her sense of responsibility in making the difficult and uncomfortable penalty determination.

She could very likely have concluded that since a

person can be executed only once, the second death penalty sentence, the one that she was contemplating, was a mere formality, and the real possibility for the defendant's -- responsibility for the defendant's death sentence belonged to the first jury and not herself.

This Court finds as a result of Mrs. Durham's knowledge with respect to Mr. Carpenter's prior death penalty sentence that the prosecution is unable to rebut the presumption of prejudice that arises out of the facts in this case and that the very real possibility of actual harm to the defendant as a result of Mrs. Durham's misconduct is completely apparent in the context of the penalty phase deliberations.

And so the Court finds, in applying the MARTINEZ test to the penalty phase in this case, the Court finds that Mrs. Durham would have her impartiality compromised against the defendant by knowing that another jury of 12 has concluded that he is a person worthy of the death sentence and that would affect her decision.

The prosecution's burden of proof in this case in the penalty phase -- it's not the prosecution's burden. It's the prosecution does maintain a burden, and that burden has been lightened by the fact that Mrs. Durham knew that Mr. Carpenter had been sentenced to the death penalty.

There is simply no way that she could have given the -- no matter what she felt about Mr. Carpenter, there's no way that she could have given that the same kind of

consideration knowing on one hand that the defendant already had been sentenced to death by another jury. So I think the prosecution's burden to that extent was lightened.

And it also certainly affected her ability to judge the defense that Mr. Carpenter was presenting with respect to an offer of life imprisonment. Basically, I think she would have to say, "What difference does that make because he's going to die anyhow, no matter what they tell us about it?" So she couldn't have treated it in the same light. So I really don't think there's any question, whatsoever.

And whether the standard that requires the prosecution to rebut the presumption of prejudice is either by a preponderance of the evidence or beyond a reasonable doubt, they failed on either score to rebut the presumption of prejudice with respect to the penalty phase.

Now, in the guilt phase of this case the Court finds that the evidence of guilt is overwhelming. And I've stated and would repeat again that I believe that without a shadow of a doubt that Mr. Carpenter was guilty of the charges that were presented against him without any question.

Now, the cases have never articulated the standard to be applied by an appellate court in determining whether the presumption of prejudice has been rebutted, but I find from the briefs filed by the parties that it's clear that the usual harmless error tests for determining the

prejudicial effect of an error is inapplicable, and that's PEOPLE vs. WATSON and CHAPMAN vs. CALIFORNIA.

Convincing evidence of guilt does not debrief the defendant of a right to a fair trial since a fair trial includes, among other things, the right to an unbiased jury, the presumption of innocence and the right to assert a defense after the prosecution has presented its case-in-chief.

So I couldn't -- I think the cases compel me to find, Mr. Posey, that the harmless error test cannot be applied in the context of jury misconduct, but I will, pursuant to your request, make a finding at the end as to how I would so find if it were to apply to this situation.

Now, with respect to the guilt phase, to rebut the presumption of prejudice the People must show that Mrs. Durham remained impartial despite her knowledge of appellant's other convictions for similar crimes and death sentence, and also, as the MARTINEZ test states, the prosecution's burden of proof was not lightened, and that no assertive defenses had been contradicted. That is a factual situation, and the likelihood of the same verdict despite the misconduct is of no consequence.

There are cases where a presumption of prejudice has been rebutted. Mr. Posey cited a number of those. There has been a number cited in the petitioner's brief, also.

Factors which have been considered are whether

the extrajudicial information was inherently nonprejudicial, whether the information pertained to matters unrelated to the pending case, whether the Court had an opportunity to alleviate the potential prejudice with a curative admonition to the jurors.

In this case the Court cannot find that the misconduct committed by Ms. Durham and the information she received was innocuous or of a trivial nature. I would find that the extrajudicial information that caused her misconduct was inherently prejudicial. It related directly to the pending action. And the Court was unable to give a curative admonition to the jury -- to the juror in this case.

Analyzing the criteria set forth in MARTINEZ, the respondent has not made a factual showing sufficient to rebut the presumption of prejudice in this case as to the guilt phase. In this case, the nature of the information was such that the juror's impartiality could not be anything but adversely affected.

The fact that the juror, first of all, knew that Mr. Carpenter was the kind of person that 12 other people had sentenced -- chose to sentence to death, in my judgment, could not but affect her determination of whether or not she could remain a fair and impartial juror as to this case and in evaluating the evidence and also his own testimony. So I definitely believe it affects her impartiality.

As to whether or not the prosecution's burden was

lightened in this case, this unique aspect of this case makes the information Mrs. Durham knew highly prejudicial, and that's the fact that it was conceded by the defense and argued by the prosecution that one person committed both the Santa Cruz and the Marin murders.

And the evidence really supported that theory. Both the defense assumed it and the prosecution argued it. And if the juror in this case, Ms. Durham, believed or understood that 12 other persons had found the petitioner, Mr. Carpenter, guilty of the Santa Cruz murders beyond a reasonable doubt, the prosecutor's job of proving the petitioner guilty beyond a reasonable doubt in the Marin cases would be much easier.

And I've talked about this during the course of the arguments, and I don't see any sense to re-elaborate on that question, the uniqueness of this case. I think the record is clear.

Of the time involved in the guilt phase of the trial, I would estimate that two-thirds of that time was directed at the evidence of the Santa Cruz Hansen/Haertle incident and remaining one-third was directed at proving the Marin crimes. That's how important they were. And that's what makes --

Everything was done in this case by the Court, as I've stated this morning before, to keep from the jury the evidence that Mr. Carpenter had been convicted of the Santa Cruz crimes, particularly the Hansen/Haertle crimes, in the guilt phase. And everything was done by this Court in its

rulings to keep from the jury in the penalty phase that Mr. Carpenter had been sentenced to death as a result of the Santa Cruz crimes. And despite everything that was done by way of evidentiary rulings and the like, this is exactly the information that Mrs. Durham had.

And there's no question in my mind, in talking about similar crimes, the one thing that I think is clear that Mr. Posey and Mr. Berlin have argued about through the use of the transcripts, the one thing that she would have definitely ascertained is the convictions related to the Santa Cruz crimes because that's where the transcripts were all directed in most of the impeachment of the Santa Cruz witnesses.

So if there was anything that could be derived from the use of the transcripts, if she didn't know specifically that the crimes were from Santa Cruz county, this then she would certainly have derived that information from the trial, given the use of the transcripts.

As to the third prong of the MARTINEZ test, that the petitioner asserts a defense, in this case, that he was not the trailside killer, that was certainly undermined by the knowledge that another jury had found that he was in fact the trailside killer.

So I can't find that that prong has been rebutted, either. And any one of the three prongs that has not been rebutted would be sufficient enough to give Mr. Carpenter a new trial.

And for these reasons, the Court reluctantly has

connected with this case. This is an absolute travesty that such a result could happen to such a case.

And I find the fault with the foreperson in this case, Barbara Durham. And as I've indicated before -- I have not done this yet because I wanted to wait until the ruling this afternoon -- a letter is going to be delivered to the Attorney General's office in San Diego as well as to the District Attorney's office for the County of San Diego that will state that on today's date this Court granted a new trial and set aside the conviction and death penalty sentence in the above-captioned case.

That the action by the Court was mandated by serious juror misconduct of the foreperson, Barbara Durham. And I am certain that your office is aware of the enormous effort and expense which has been wasted by the misconduct of Mrs. Durham. That I believe the matter should be reviewed for possible criminal prosecution under Penal Code Section 96.

And I'm enclosing with the letter the entire transcript of the jury misconduct and habeas corpus proceedings, and that I'm advising each party that I've made a similar referral to the other party and asking that I be advised of their decision in connection with the referral.

Mr. Posey, I take it from your remarks today the People certainly propose to take an appellate route with respect to the Court's ruling this morning. How would you suggest we proceed by way of further proceedings?